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No. 89-503

In the Supreme Court of the United States

OCTOBER TERM, 1989

JAMES CHARLES WALLACE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner had a legitimate expectation of privacy in a shed containing a drug manufacturing laboratory.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Blum v. *Bacon*, 457 U.S. 132 (1982)	7
Illinois v. *Rodriguez*, cert. granted, No. 88-2018 (Oct. 30, 1989)	6, 8
Katz v. *United States*, 389 U.S. 347 (1967)	6
Rakas v. *Illinois*, 439 U.S. 128 (1978)	6
Rawlings v. *Kentucky*, 448 U.S. 98 (1980)	6
United States v. *New York Telephone Co.*, 434 U.S. 159 (1977)	7
United States v. *Payner*, 447 U.S. 727 (1980)	6
United States v. *Salvucci*, 448 U.S. 83 (1980)	6
United States v. *Wallace*, No. CR-F-87-81 REC (E.D. Cal. Apr. 19, 1988)	4, 5
Washington v. *Yakima Indian Nation*, 439 U.S. 463 (1979)	7

Constitution and statutes:

U.S. Const. Amend. IV	5, 6
21 U.S.C. 841(a)(1)	2
21 U.S.C. 846	2

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 1a-13a, is unreported, but the judgment is noted at 878 F.2d 388 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1989. On August 14, 1989, Justice O'Connor extended the time for filing a petition for a writ of certiorari to September 20, 1989, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of California, petitioner was convicted of conspiring to manufacture PCP, in violation of 21 U.S.C. 846; manufacturing PCP, in violation of 21 U.S.C. 841(a)(1); and possessing PCC with the intent to manufacture PCP, in violation of 21 U.S.C. 841(a)(1). The district court sentenced petitioner to concurrent terms of ten years' imprisonment on the substantive counts, to be followed by five years' probation on the conspiracy count.

1. On the evening of July 19, 1987, two police officers responded to a complaint of a suspicious odor in a rural area in the foothills of the Sierra Nevada Mountains. Each officer drove his marked patrol car to the area. Upon leaving their cars, the officers smelled a strong chemical odor emanating from a shed at 11340 Arapaho Way, which was approximately 100 yards away. 4/18/88 Tr. 14, 15. One of the officers walked toward the shed. As he approached, several people left the shed and entered a nearby automobile. 4/18/88 Tr. 16. The automobile then left the property at a high rate of speed. Gov't C.A. Br. 4.

The two officers returned to their patrol cars and pursued the fleeing automobile. They found it half a mile away, upside down and off the road. Next to the overturned automobile were petitioner, co-defendant Kelvin Williams, and a neighbor who had stopped to assist them. Petitioner and Williams were placed under arrest for evading a peace officer. 4/18/88 Tr. 17. Petitioner stated that he had been driving the wrecked automobile and that he was driving fast because he had been "drinking, smoking reefer and using ether." Because the clothing of petitioner and Williams smelled strongly of ether, the two officers placed them in one of the patrol cars and drove them back to 11340 Arapaho Way. Gov't C.A. Br. 4-5.

When the officers returned to 11340 Arapaho Way, they were met by co-defendant Alvin Upson. One of the officers informed Upson that a strong chemical odor was coming from the shed. Concerned that a volatile drug laboratory might be located inside the shed, the officer requested permission to search it. 4/18/88 Tr. 19. Upson stated that although he had rented the shed to petitioner and Williams (both of whom remained in the rear of the patrol car), Upson had a key to the padlock on the shed. Upson consented to the search and unlocked the shed for the officers. Gov't C.A. Br. 5.

Inside the shed, one of the officers found numerous white plastic buckets in which some kind of chemical reaction was taking place. He also observed a large container marked "sodium cyanide," containers of metal shavings, and a pair of gas masks. More concerned than ever about the possibility of a fire or chemical explosion, the officer asked petitioner and Williams whether there was any danger presented by the chemical reactions taking place in the shed. Both petitioner and Williams disavowed any knowledge of the contents of the shed. 4/18/88 Tr. 20-21; Gov't C.A. Br. 6.

The officer requested additional assistance, and another officer soon arrived. After inspecting the shed for possible fire hazards, he contacted a California Department of Justice chemist to obtain his opinion about whether the chemicals in the shed were likely to explode. Upon being advised that the chemical reactions taking place in the buckets presented little danger of fire or explosion, the officers guarded the shed until a search warrant could be obtained. Gov't C.A. Br. 6-7.

The following day, police officers executed a search warrant for the shed and surrounding area. In the shed, the officers found a fully operational PCP laboratory with equipment and chemicals capable of producing more than 60 pounds of PCP. Among those chemicals was 55 pounds

of PCC, which a chemist identified as the immediate precursor of PCP and which has no use other than to produce PCP. Gov't C.A. Br. 7.

After his arrest, petitioner gave a statement to the police. Petitioner claimed that he and Williams went to Upson's property to go to a party and that he had never been to the property before. Petitioner explained that shortly after he arrived on the property he had met a seven-foot tall black man who gave him some "reefer" to smoke that made him ill. Gov't C.A. Br. 10.[1]

2. The district court denied petitioner's motion to suppress the evidence that was seized from the shed. First, the court concluded that petitioner had "not shown that he had a reasonable expectation of privacy" in the shed because petitioner had represented, in his motion for severance, that he lacked any possessory or other interest in the shed. *United States* v. *Wallace*, No. CR-F-87-81 REC (E.D. Cal. Apr. 19, 1988), slip op. 5. Second, the court determined that petitioner had abandoned any expectation of privacy he may once have had in the shed when he fled from that structure as the officers approached and when he denied any relationship to the shed upon being asked about its contents. *Id.* at 7. The court found that petitioner had abandoned

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[1] Petitioner denied seeing the officers before he drove away from the property.

Petitioner gave a different account when he testified at trial. At that time, petitioner said that he was present at 11340 Arapaho Way on the night of his arrest for the purpose of purchasing a "bobtail" cat from Upson. He testified that he arrived at Upson's residence shortly before dark and met an unknown man who insisted that he smoke a cigarette. Petitioner admitted that he did not smoke. But he smoked the cigarette anyway and became very ill. Petitioner said that the side-effects of an unknown drug in the cigarette caused him to wreck his car. Gov't C.A. Br. 10-11.

any interest in the shed "even though [petitioner's] disclaimer was made after the shed was searched without a warrant." *Id.* at 7-8.[2]

3. The court of appeals affirmed on the basis of the district court's factual finding that petitioner had "forfeited any expectation of privacy he had in the property when he abandoned it." Pet. App. 9a-10a. In determining whether particular property has been abandoned, the court of appeals observed that courts consider "the totality of [the] circumstances, and two important factors are denial of ownership and physical relinquishment of the property." Pet. App. 10a. In this case, the court of appeals adopted the district court's findings that petitioner "fled the premises at high speed upon the approach of the police" and that petitioner "subsequent[ly] disclaime[d] * * * any ownership interest in the premises"—findings that the court of appeals held were not clearly erroneous. *Ibid.* On the basis of those findings, the court of appeals held that petitioner's "fourth amendment rights were not implicated in the search of the shed." *Ibid.*[3]

ARGUMENT

Petitioner renews his contention that he had a legitimate expectation of privacy in the shed at 11340 Arapaho Way. Pet. 5-9.

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[2] Because it found that petitioner had no legitimate expectation of privacy in the shed, the district court did not consider the reasons the government gave for concluding that the police officers' warrantless search was reasonable under the Fourth Amendment. *United States* v. *Wallace*, slip op. 8 n.1.

[3] Because it found that petitioner had abandoned any privacy interest in the shed, the court of appeals, like the district court, had no occasion to consider the government's argument that the warrantless search of the shed was lawful.

1. To claim the protection of the Fourth Amendment, a defendant bears the burden of establishing that he had a "legitimate expectation of privacy" in the invaded place. See, *e.g.*, *Rawlings* v. *Kentucky*, 448 U.S. 98, 104 (1980); *Rakas* v. *Illinois*, 439 U.S. 128, 131 n.1, 143 (1978). To do so, the defendant must show that he had a subjective expectation of privacy in the premises that society recognizes as reasonable. *Rakas*, 439 U.S. at 143-144 n.12; *Katz* v. *United States*, 389 U.S. 347, 353 (1967); *id.* at 361 (Harlan, J., concurring). The requirement that a defendant have a legitimate expectation of privacy follows from the principle that Fourth Amendment rights are personal in nature: "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of *his* Fourth Amendment rights infringed." *Rakas*, 439 U.S. at 134 (emphasis added). See *United States* v. *Salvucci*, 448 U.S. 83, 86-87 (1980); *United States* v. *Payner*, 447 U.S. 727, 733 (1980).

Petitioner failed to meet his burden of proving that he had a legitimate expectation of privacy in the shed at 11340 Arapaho Way at the time the officers entered it. Petitioner did not testify at the suppression hearing and claim that he was renting or otherwise had any interest in the shed. Gov't C.A. Br. 16 n.3. To the contrary, petitioner affirmatively disavowed any interest in the shed in his motion for a severance. Gov't C.A. Br. 13. Moreover, both in his statement to the police after his arrest and in his testimony at trial, petitioner claimed he was present at the shed only as a visitor on the evening that he was arrested and that he had no other connection to the shed.

Petitioner's claim of standing therefore stands or falls on Upson's statement to the police officers that petitioner and

Williams had rented the shed from Upson.[4] In light of petitioner's subsequent denials of any interest in the shed, and evidence showing that the shed was on Upson's property and that Upson was apparently the only person present who had a key to the padlock on the shed, the district court was correct to conclude that petitioner failed to demonstrate a legitimate expectation of privacy in the shed. That finding is not clearly erroneous and does not merit review by this Court.

2. Even if petitioner had a legitimate expectation of privacy in the shed at 11340 Arapaho Way, the police officers' warrantless search of the shed was justified by exigent circumstances and consent.[5]

As they approached the shed, the officers smelled "extremely strong" chemical odors: "They were to the point where it was hard to walk around without feeling like you were getting congested with the odors." 4/18/88 Tr. 18. Petitioner's flight from the shed, his admitted drug use, and the strong smell of ether on his person provided the officers with probable cause to believe that potentially volatile chemical reactions were taking place inside the shed. 4/18/88 Tr. 19, 22.

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[4] At trial, Upson denied ever telling the officers that he had rented the shed to petitioner and Williams and instead testified that he had rented the shed to a man named Wilson. Gov't C.A. Br. 11.

[5] As the prevailing party in both courts below, the government may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). See, *e.g.*, *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977). The government argued in both the district court and the court of appeals that the police officers' warrantless search of the shed was justified by exigent circumstances and consent. Gov't D. Ct. Br. 10-16; Gov't C.A. Br. 17-18 n.4. Accordingly, the government is entitled to defend the judgment on those grounds.

Those particularized exigent circumstances dictated that the officers search the shed and determine whether a danger of fire or explosion existed. The officers' initial search was carefully limited to that objective; a full search of the shed took place only after the police had obtained a valid search warrant the following day. The officers' bona fide concern for their safety and that of the others present was demonstrated by the officers' inquiry of petitioner and Williams whether the chemical reactions taking place presented a fire hazard.

Moreover, the officers had valid consent to enter the shed from Upson, who had authority over the premises. Even according to Upson's own account, he at least shared control over the shed with petitioner. The evidence showed that Upson and his girlfriend occupied the mobile home located at 11340 Arapaho Way and entered the shed two to four times a month to take garbage out of it. Gov't D. Ct. Br. 12 & n.2.[6]

Even if Upson lacked actual authority over the shed, the police officers on the scene were justified in relying on his apparent authority to consent to the search. The facts that Upson lived on the property and possessed a key to the shed justified the officers' good faith reliance on Upson's claim that he was authorized to enter the shed and thus could validly consent to the search.[7]

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[6] Petitioner now asserts that the relationship between petitioner and Upson was that of a tenant to his landlord, see Pet. 5-6, but that characterization does not accurately reflect the evidence adduced in the district court.

[7] The issue whether the police officers could rely on Upson's apparent authority to consent to a search of the shed is similar to the first question presented in *Illinois* v. *Rodriguez*, cert. granted, No. 88-2018 (Oct. 30, 1989). We believe that the judgment in this case is correct even if the police officers could not have relied on Upson's apparent authority

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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to consent to the search of the shed, and we therefore urge that the petition in this case be denied rather than held pending the decision in No. 88-2018.

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